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Supreme Court, U.S.
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No. 109

In the

Supreme Court of the United States

October Term, 1969

TIME, INCORPORATED,

Petitioner,

vs.

FRANK PAPE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 1309

TIME, INCORPORATED,

Petitioner,

vs.

FRANK PAPE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR RESPONDENT

OPINIONS BELOW

The brief of the Petitioner correctly sets forth the citations of the various opinions below, except that it fails to note that certiorari was denied the second opinion of the United States Court of Appeals for the Seventh Circuit by the Supreme Court of the United States in 384 U.S. 909.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Brief of the Petitioner.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are the First, Fourth, Fifth, Seventh, Ninth and Fourteenth Amendments to the United States Constitution. They provide as follows:

> "Congress shall make no laws respecting an establishment of religion, or prohibiting the free exercise thereof, or abridge the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const., Amend. I.

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affidavit, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const., Amend. IV."

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law, nor shall private property be taken for public use, without just compensation." U.S. Const., Amend. V.

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. Const., Amend. VII.

"The enumeration in the Constitution of certain rights shall not be construed to deny, or disparage others retained by the people." U.S. Const., Amend. IX.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., Amend. XIV, Sec. 1.

QUESTION PRESENTED

The question presented is whether, in a libel action, after viewing all of the evidence in the light most favorable to the plaintiff, and after drawing all reasonable inferences therefrom in favor of the plaintiff, there was any evidence upon which a fairminded jury could find the defendant, Time, Inc., in publishing its falsehood, guilty of malice; that is, knowledge that its story was false, or reckless disregard of whether its story was true or false.

STATEMENT OF THE CASE

This is a suit for libel brought by plaintiff, a Chicago police officer, against Time Incorporated, the publisher of Time Magazine. The claim of the plaintiff is based upon a story printed in Time Magazine under date of November 24, 1961. This is an appeal from an order of the District Court granting at the close of all of the evidence a directed verdict in favor of defendant.

Plaintiff, Pape, became a policeman in March 1933. He worked as a detective with the State's Attorney's Office of

Cook County, Illinois, from 1933 through 1937. In 1939 he was transferred to the Detective Bureau of the Chicago Police Department, and thereafter was assigned to the robbery detail, where he worked until 1959. In 1942 he was promoted to sergeant. He was promoted to lieutenant in 1952. (A. 30) During the period Pape was a sergeant of police he participated in hundreds of arrests. (A. 170). Plaintiff was promoted to Deputy Chief of Detectives in 1957 and held that position for two years. He was promoted to Captain in 1959. On November 24, 1961 Plaintiff, while on leave of absence from his police position, was employed as Director of Security for Chicago Thoroughbred Enterprises, Inc., which company operates several race tracks in the Chicago area.

On November 17, 1961 the Annual Report of the United States Commission on Civil Rights was issued and published (A. 220). Throughout the Report the Commission makes it clear that it was dealing with allegations, complaints, litigation and not facts. In its Introduction the Report states:

> "The Commission has been disturbed by persistent reports of unconstitutional and violent acts of some agents of justice in the United States.
>
> "After an extensive review of these allegations and the entire field of administration of justice, the Commission authorized a study of these problems. . . ." (A. 327)

The chapter of the Commission's Report relevant hereto begins with the Statement:

> "In the text of this chapter the Commission briefly describes the alleged facts in eleven typical cases of police brutality." (A. 328)

The Report went on to caution:

"In no case has the Commission determined conclusively whether the complainants or the officers are correct in their statements. That is the function of a court." (A. 328)

The Commission's Report went on to recite eleven incidents. Insofar as ten of these were concerned the Commission identified the officers involved only by initials. The remaining incident reported by the Commission concerned the plaintiff, Pape, and appeared on pages 20 and 21 of its Report, as follows: (A. 329)

"Search, Seizure and Violence: Chicago, 1958—The Supreme Court of the United States decided the case of *Monroe* v. *Pape* on February 20, 1961. Although its decisions did not finally dispose of the case, it did permit the plaintiff to sue several Chicago police officers for violation of the Federal Civil Rights Act on the basis of a complaint which alleged that:

"'. . . On October 29, 1958, at 5:45 a.m., thirteen Chicago police officers, led by Deputy Chief of Detectives Pape, broke through two doors of the Monroe apartment, woke the Monroe couple with flashlights, and forced them at gunpoint to leave their bed and stand naked in the center of the livingroom; that the officers roused the six Monroe children and herded them into the livingroom; that Detective Pape struck Mr. Monroe several times with his flashlight, calling him "nigger" and "black boy"; that another officer pushed Mrs. Monroe; that other officers hit and kicked several of the children and pushed them to the floor; that police ransacked every room, throwing clothing from closets to the floor, dumping drawers, ripping mattress covers; that Mr. Monroe was then taken to the police station and detained on "open" charges for ten hours, during which time he was interrogated

about a murder and exhibited in line-ups; that he was not brought before a magistrate, although numerous magistrate's courts were accessible; that he was not advised of his procedural rights; that he was not permitted to call his family or an attorney; that he was subsequently released without criminal charges having been filed against him.'"

On November 24, 1961 Time, Inc. published its magazine with nationwide circulation of 2,700,000 (A. 17), containing the following article:

"Dawdling on the Corner

"The new paperback book has 307 pages and the simple title *Justice*. It is the last of five volumes in the second report of the U. S. Commission on Civil Rights, first created by Congress in 1957. *Justice* carries a chilling text about police brutality in both the South and the North—and it stands as a grave indictment, since its facts were carefully investigated by field agents and it was signed by all six of the noted educators who comprise the Commission.

"The bluntly frank report tells of a police officer referred to only as 'Y', in Dawson, Ga., who arrested Negro James Brazier for speeding in November 1957. It quotes Brazier: 'When I first entered the door of the jail "Y" hit me on the back and the head and knocked me down and said, "You smart son-of-bitch. I been wanting to get my hands on you for a long time." I said, "Why you want me for?" "Y" said, "You is a nigger who is buying new cars and we can't hardly live. I'll get you yet."' When Brazier was arrested again five months later by the same officer, Brazier's wife related, '"Y" then said, "I told you I would get you." James said, "What do you want to hurt me for? I ain't done nothing. I got a heap of little chillun." "Y" said, "I don't give a goddam how

many children you got, you're going away from here."' 'Y' pulled out his pistol and stuck it against James' stomach."

"Beaten to Death. Continues the report: 'Brazier's ten-year-old son pleaded with the officers to stop beating his father and was knocked to the ground by "Y"; the victim was thrown onto the floor of the police car with his legs dangling outside. "Y" kicked him twice in the groin, slammed the door on his legs, threw a hat full of sand into his bloody face, and drove off.' Brazier died five days later, and 'Y' was never punished.

"Shifting to the North, the report cites Chicago police treatment of Negro James Monroe and his family, who were awakened in their West Side apartment at 5:45 a.m. by thirteen police officers, ostensibly investigating a murder. The police, says *Justice*, 'broke through two doors, woke the Monroe couple with flashlights, and forced them at gun point to leave their bed and stand naked in the center of the living room. The officers roused the six Monroe children and herded them into the living room. Detective Frank Pape struck Mr. Monroe several times with his flashlight, calling him "nigger" and "black boy." Another officer pushed Mrs. Monroe. Other officers hit nd kicked several of the children and pushed them to the floor. The police ransacked every room, throwing clothes from closets to the floor, dumping drawers, ripping mattress covers.' The officers were not punished, although Monroe has carried a suit to the Supreme Court, is still seeking a civil judgment."

Thereafter, the plaintiff, Frank Pape, filed this action against Time, Incorporated, founded on libel, alleging the aforesaid Time article was false in that it reported the Commission *said* Pape had done the aforesaid things, when, in fact, the Commission was only reporting allega-

tions of a complaint. Time filed a motion to strike the complaint filed by Pape, which motion was granted by the District Court.

On April 25, 1963, in the case of *Frank Pape* v. *Time, Inc.* (1963, C.A. 7, Illinois), 318 F. 2d 652, the Circuit Court of Appeals rendered its decision reversing the District Court. The Circuit Court of Appeals there held that "Time took the risk when it re-worded parts of the Commission's Report that it might go too far", and further held that a jury could find that Time went beyond the limits of fairness and in so doing was not protected by its privilege of fair comment. The Circuit Court of Appeals further found that "a jury could read the Time article as stating that the Report said that Pape and his fellow officers *did* what the Commission Report merely said the Monroe complaint *alleged they did*." (Emphasis supplied)

Thereafter this Court, in the case of *New York Times* v. *Sullivan*, 376 U.S. 254, rendered its decision, holding that in a libel action by a public official there must be a showing that the false statement was made with malice; that is, knowledge of its falsity or reckless disregard of whether it was true or false.

On remandment of this cause an answer was filed by Time. The deposition of Pape was taken and the District Court granted a motion for summary judgment, relying on the case of *New York Times* v. *Sullivan, supra.* A second time the case was appealed to the Circuit Court of Appeals. On the second appeal in *Frank Pape* v. *Time,* (1965 C. A. 7th, Illinois), 354 F.2d 558, the Circuit Court of Appeals held the defendant, Pape, a public official within the meaning of *New York Times* v. *Sullivan, supra,* and considered whether or not in the record before it the motion for summary judgment revealed facts sufficient to

show the statement made by Time, Inc. was made with "actual malice"—that is, with knowledge that it was false or reckless disregard of whether it was false or not. In this regard the Court said:

> "We must now determine whether there is sufficient showing in the record before us that Time's statements were knowingly false or made with reckless disregard as to whether or not such statements were false.
>
> "As stated in our previous decision '. . . Time took the risk when it re-worded parts of the Commission's Report that it might go too far . . .' We noted Time had departed from fidelity to the Commission's Report in order to make the article more interesting and readable for its audience. Time's writers who prepared the article must have known the statements as to Pape's conduct were only allegations in a complaint in a civil suit. As we put it (381 F.2d, at page 655), 'it is our opinion that a jury could read the Time article as stating that the Report *said* Pape and his follow (sic) officers did what the Commission Report merely said the Monroe complaint alleged they did.'
>
> "We hold that a sufficient showing has been made so that a jury could find Time, Inc. acted with reckless disregard as to whether or not re-worded statements hereinbefore described were true or false. Therefore, it was error for the District Court to grant defendant's motion for summary judgment."

Certiorari was denied this decision by the Supreme Court of the United States in 384 U.S. 909.

On the second remandment this cause proceeded to trial before a jury. Eight eye-witnesses were produced, including the plaintiff, Pape, each of whom testified as to the incident set forth in the Commission's Report and

the Time article. Generally, each of these witnesses denied those acts set forth as facts in the Time article and as allegations of a complaint in the Commission Report. In addition, on the trial of the cause there was presented the testimony of Edward F. Magnuson, the author of the Time article.

Magnuson, a former police reporter for the Minneapolis Tribune, testified that he had three documents to which he referred when he wrote the Time article (A. 173). These documents consisted of the Commission's Report, heretofore set forth, a news release from the Commission accompanying its Report, Exhibit G, which in no way mentions the plaintiff, Pape (A. 177), and a New York Times story, Exhibit H, which in no way mentions plaintiff, Pape (A. 177). Magnuson found no reference to Plaintiff Pape in the Commission Report, other than as heretofore quoted (A. 177). Magnuson also testified that in addition to the aforesaid, the only other investigation he made was to inquire whether Pape had been punished, Plaintiff Pape's first name, and the location of the apartment where the incident occurred (A. 178). As far as writing the article is concerned, the author testified as follows (A. 176-177)

> "Q. Would you describe, sir, what deletions you made between the matter you read in the government publication and the matter which you read in the Time article?
>
> "A. Well, we have deleted only in the quotable parts here the section of that paragraph which is within quotes. The only changes in that section have been to change the word 'that' in the *Justice* document to 'the' in order to break up this long, long sentence. We have changed the semicolon to periods, again in the interests of clarity. Then we did not continue the whole quote, which goes on to what

happened after Monroe was arrested and brought to the police station.

"Q. You also, sir, omitted that part of the article that is in *Justice,* which reads, 'On the basis of a complaint which alleged that . . .'

"A. That's right."

Magnuson further testified that he knew he was reporting as fact what the Commission only reported as allegations in a complaint. Magnuson testified as follows (A. 207-209):

"Q. . . . I will read it for you. I am reading after the words 'Searches, seizures, violence, Chicago', 'The Supreme Court of the United States decided the case of Monroe v. Pape on February 20, 1961. Although this decision did not finally dispose of the case, it did permit the plaintiff to sue several Chicago police officers for violation of the Federal Civil Rights Act on the basis of a complaint which alleged that', you did read that?

"A. I certainly did, right. . . .

"Q. You did state you are a former police reporter?

"A. That's right.

"Q. You understand the word 'complaint'?

"A. That's right.

"Q. You understand the word 'alleged'?

"A. That's right.

"Q. Therefore, while you did not find the word 'allege' in the running head, 'Searches, seizures and violence, Chicago, 1958', you did find it in the body, is that right?

"A. I did, sir, right.

"Q. You found the word 'complaint'?

"A. That's right.

"Q. Well, I will read it again, sir, it says '. . . on the basis of a complaint which alleged' . . . Mr. Reuben asked you a moment ago to tell us what you

thought, so suppose you now tell me what you think. What did you think when you read' . . . on the basis of a complaint which alleged . . .' ? Tell us what that means to you.

"A. That means to me the Commission in this case is reporting this incident in terms of a claim being made in a Court by the Monroes, but you can't stop there . . .

"Q. There is more here than just an allegation or a complaint.

"A. In the context of this report there is more than just an allegation involved here, that is right.

"Q. You did not understand this as simply the complaint of James Monroe as filed in a court suit.

"A. I knew they were citing the complaint of James Monroe.

"Q. However, you understood that there was more to it than just that.

"A. That's right."

Mr. Magnuson admitted that by the Time article he was not trying to say the Commission was reporting allegations of a complaint. Magnuson further testified the changes which he made in his article from the Commission Report did not make it clear to readers that these were allegations of a complaint. (A. 215)

Testimony was also presented on the trial of this case by one Karen Booth, editorial researcher for Time Magazine, who was the researcher on the Time article which is the subject matter of this action. (A. 219) As a part of her job she read the Commission Report and checked the Time story against the report (A. 220). In checking the article against the Commission Report she found that the author did not use the full statement set forth in the Commission Report in his story in Time Magazine (A. 223). Reference to "complaint" and "allegations" had

been left out. As to whether or not she called such omissions to the attention of the author, Researcher Booth stated that she did not believe that to be her function. According to her, the writer had chosen, in conjunction with the editor, which materials they were going to use from the particular quotation (A. 224). It was not her function to determine whether the whole statement would be used (A. 224). The researcher also testified that she called for all the material on Monroe and Pape in Time's "morgue" file (A. 220-221). She examined the "morgue" but the only attempt to call this "morgue" to the attention of the author was a conversation wherein Mrs. Booth told the author that there was quite a bit of material on Capt. Pape and the Monroes in the library and other newspapers had published reports of the incident (A. 205).

Researcher Booth concluded her testimony by stating that she felt the Commission Report was factually accurate since it was an official U. S. body. (A. 231). She made no comment on the factual accuracy of the Time story.

At the close of the plaintiff's case the defendant moved for a directed verdict, which motion was denied. At the close of all the evidence the defendant again moved for a directed verdict, which motion was allowed.

Plaintiff thereupon appealed for the third time to the Circuit Court of Appeals. On such appeal, in *Pape* v. *Time, Inc.*, 419 F.2d 980, the Circuit Court of Appeals once again reversed the judgment of the District Court and remanded the cause for trial.

In this third opinion the Circuit Court of Appeals said:

> "In our second opinion we stated, at 354 F.2d, 560, 'Time's writers who prepared the article must have known the statements as to Pape's conduct were only allegations in a complaint in a civil suit.' Since that

time the author of the Time article, one Edward F. Magnuson, has so testified. He admits that when he wrote the article he knew the Commission's Report stated that the alleged assaults on Monroe and his family were based upon a complaint which made such allegations. Magnuson was a former police reporter for the Minneapolis Tribune and he testified he knew the meaning of the word 'complaint' and of the word 'alleged.' However, Magnuson deliberately and knowingly failed to mention in his article that his story of the alleged conduct and the action of Pape and the other police officers was based on allegation in a complaint in a pending suit.

"We are here concerned with Time's falsification of what the Report said rather than the falsification of a story about the Monroe incident. Surely, a deliberate act of omission can show malice as well as an act of commission. Time omitted mention of the fact that when the article was written the Pape-Monroe incident was reported in *Justice* as allegations in a complaint, not as proven fact, and the alleged injury to Pape was in Time's stating that the Commission reported the incident as true instead of stating that the Commission reported it as alleged to be true. The jury could conclude that this amounted to an 'intent to inflict harm through falsehood.' (Citations)

"We think pertinent the recent statements of the Court of Appeals for the Second Circuit in *Goldwater* v. *Ginsberg,* 414 F.2d 32, 327 (2nd Cir. 1969): 'One cannot fairly argue his good faith or avoid liability by claiming that he is relying on the reports of another if the latter's statements or observations are altered or taken out of context.'"

In a concurring opinion Judge Kiley of the Circuit Court of Appeals stated:

"It is my view that the testimony of Magnuson referred to in Judge Duffy's opinion was sufficient

prima facie to prove that Time published the article in suit with knowledge that it was false. The publication of the article with the words in the Commission Report deliberately omitted could reasonably be found to be a publication of 'a defamatory falsehood . . . with knowledge that it was false.' This met the test of *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), under which either knowledge of falsity or reckless disregard of whether the material is false or not is required for proof of the vital element of 'malice' . . ."

SUMMARY OF ARGUMENT

In the instant case of libel this court is called upon to maintain the delicate balance between the right of an individual to his privacy guaranteed by the Fourth, Fifth, and Ninth Amendments to the United States Constitution and the right of a publication to free speech and press guaranteed by the First Amendment to the Constitution.

This court in *New York Times* v. *Sullivan* has required that in a libel action a public official must show that the Defendant was guilty of actual malice, that is the Defendant published its story with knowledge of its falsity or with reckless disregard of whether its story was true or false. The instant case comes to this court on a motion for directed verdict and under such circumstances the court must determine whether or not there is any evidence from which a fair-minded jury could determine that the Defendant, Time Magazine, was guilty of malice. The evidence must be looked at in the light most favorable to the Plaintiff, giving to the Plaintiff all reasonable inferences and intendments.

In the instant case, Time's article was particularly scurrilous reporting that a high level commission found the Plaintiff police officer guilty of a heinous crime in the

course of his employment. Time admitted that this high level commission merely reported that a "Complaint" had been filed which "alleged" such heinous crimes but chose to omit the words "alleged" and "complaint" and translate the Commission's Report into findings of fact. Time Magazine took such action without the simplest investigation. This is evidence from which a fair-minded jury could find Time guilty of malice—the knowing or reckless disregard of the truth.

The Circuit Court of Appeals below recognizes that a sufficient showing had been made of malice to permit this case to go to the jury and said court should be affirmed.

ARGUMENT

I.

In this Defamation Action the Courts Must Maintain the Delicate Balance between Time Magazine's Right to Free Expression and Policeman Pape's Right to Protection of his own Reputation from Unjust Invasion and Wrongful Hurt

In the area of libel and slander two precious rights guaranteed by our Constitution collide—the right of privacy, emanating from the Fourth, Fifth and Ninth Amendments to the United States Constitution. (*Time* v. *Hill*, 385 U.S. 374, at pages 412-413) and the freedom of speech and press, emanating from the First Amendment. Each of these rights is delicate and vulnerable, and one should not be permitted to devour the other. All things should be done to encourage free comment but the press is only free if it is responsible.

Certainly, as was said in *New York Times* v. *Sullivan*, 376 U.S. 254, at 270, there is a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open, and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials. This does not mean, however, that in the arena of the printed word all other freedoms must fall. The remarks of Warren and Brandeis in their famous article on "The Right of Privacy" are as poignant today as the day they were written (4 Har. L. Rev. 193, at 196, 1890):

> "Of the desirability — indeed of the necessity — of some such protection, there can, it is believed, be no

doubt. The press is over-stepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle. The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury. Nor is the harm wrought by such invasions confined to the suffering of those who may be made subjects of journalistic or other enterprise. In this, as in other branches of commerce, the supply creates the demand. Each crop of unseemly gossip, thus harvested, becomes the seed of more, and, in direct proportion to its circulation, results in a lowering of social standards and of morality. . . ."

The problem of balancing the individual's right of privacy and freedom of the press is particularly acute today with the great expansion of the communications media. All kinds of ordinary citizens find themselves from time to time thrust into the public limelight through radio, television, newspapers and magazines. Time Magazine would maintain that everyone whom it writes about is a public official, public figure or person involved in matters of public interest and concern. The only protection for the right of privacy of the individual is through the laws

of slander and libel. Through such laws the Courts have the responsibility of maintaining the delicate balance between free expression and the right of a man to be let alone.

II.

Defendant, Time, Inc., When it Departed from Fidelity in its Article, Went too Far and was Guilty of Actual Malice—that is, It Disseminated Its Story with Knowledge of Falsity or with Reckless Disregard of Whether its Story was True or False.

With a background of this Court's decisions over the years, nurturing the individual's right to privacy and freedom of press (*Time* v. *Hill*, 385 U.S. 374, at pages 412-415), in 1964 this Court rendered its decisions in *New York Times Company* v. *Sullivan*, 376 U.S. 254. This case involved a libel action by the elected Commissioner of Public Affairs of the City of Montgomery, Alabama, under whose charge was the Police Department. The libelous article was an advertisement which, unlike the libel in the instant case, did not refer to the official directly by name. The statements in the advertisement upon which plaintiff, Sullivan, principally relied as referring to him, were that "truck loads of police . . . ringed the Alabama State College campus after a demonstration on the State Capitol steps and that Dr. Martin Luther King had been arrested . . . seven times." These statements were false in that although the police had been "deployed near the campus," they had not actually "ringed" it and had not gone there in connection with a State Capitol demonstration, and in that Dr. King had been arrested only four times. This Court in that case established the following rule (pages 279-280):

> "The constitutional guarantees required, we think, a federal rule that prohibits a public official from re-

> covering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."

This Court, in *New York Times* v. *Sullivan, supra,* went on to examine the record to determine whether malice existed. The Court in *New York Times* found malice lacking because the matters set forth in the advertisement were substantially true and any admissions of minor discrepancies were after the fact (page 286), because the advertisement constituted an attack on government and not on the plaintiff (page 290), because there was no reference to the plaintiff in the advertisement either by name or official position (page 288), because The New York Times was excused from an independent investigation, since it had a right to rely on the knowledge of the good reputation of the sponsors of the advertisement, and because the mere presence of contrary stories in the files of the Times did not establish that the Times knew the advertisement was false, since the state of mind required for actual malice would have to be brought home to the persons in the Times organization having responsibility for the publication of the advertisement (page 287).

Other than enunciating the aforesaid quoted proposition, the Supreme Court in *New York Times* v. *Sullivan* did not lay down guide lines as to what evidence constitutes a showing of actual malice. The Court preferred to leave this to the individual cases.

In the instant case the Court below subscribed to, recognized and applied the principles set down in *New York Times* v. *Sullivan*. The Court below stated:

". . . we recognize the doctrine 'that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice—that is, with knowledge that it was false or with reckless disregard of whether it was false or not. . . ."'"

The question, therefore, presented herein becomes what is evidence of malice sufficient to permit this cause to go to the jury.

A. The scurrilous nature of Time's defamatory words and the circumstances surrounding its publication are evidence of malice.

In the case of *Ashton* v. *Commonwealth,* 405 S.W.2d, 562, the Supreme Court of Kentucky had occasion to comment on the *New York Times* rule. At page 569 that Court said:

"It is argued that there was no evidence offered to show the defendant's defamatory statements were made with 'actual malice.' That is what *New York Times* v. *Sullivan,* 376 U.S. 254, 84 S. Ct. 710, 95 A.L. R.2d, 1412, 11 L. Ed. 2d 686, and *Garrison* v. *State of Louisiana,* 379 U.S. 64, 85 S. Ct. 209, 13 L. Ed. 125, apparently require. However, neither of those cases required independent proof of malice. Obviously, unless the defendant had told someone of an evil motive, or had voluntarily taken the stand and so testified, actual malice could be proved only as a state of mind made manifest by the nature of the defamatory words and the circumstances surrounding their publication. *New York Times* and *Garrison* do require the establishment of actual malice, (i.e., a calculated falsehood) by proof rather than presumption, but they lay down no constitutional standard with respect to the sufficiency of the proof (although *New York Times* considered the question of sufficiency)."

The Court in the *Ashton* case went on to say that malice may be proved by circumstantial evidence as any other fact or from permissible inferences which may reasonably be drawn from the defendant's conduct.

The scurrilous nature of the publication itself is evidence of malice. The Supreme Court of the United States in both *New York Times* v. *Sullivan* (*supra*) and *Rosenblatt* v. *Baer* (383 U.S. 75, 15 L. Ed. 2d 597, 86 S. Ct. 669), looked at the articles in question themselves to determine malice. In each of the instances the articles did not mention the plaintiff directly or by name. In each of the cases the Supreme Court interpreted such articles as generally attacks on government rather than attacks on individuals, and thereby found wanting any malice. Here, however, the article is not a general attack on the government of the City of Chicago. The article mentions the plaintiff by name directly, accusing him of striking a Negro and directing abusive language to such Negro. It is especially offensive because no other person is mentioned by name and other persons accused of police brutality are referred to only by initials.

The case of *Gilligan* v. *King*, 264 N.Y.S. 2d 309, 48 Misc. 2d 212, presented to the Supreme Court of New York an incident where the plaintiff, a police lieutenant, shot a 15-year-old Negro boy. Thereafter a poster was circulated by the defendant with the plaintiff's name and picture on it and the legend over the picture "Wanted for Murder." The case came to the Court on motion to strike. The Court held, assuming that the plaintiff was a public official, the issue of actual malice should be determined at a trial. The Court said, at pages 314-315:

> "It has been held that actual malice may be inferred from the language and tenor of the libelous

statement or the extent or excessiveness of the publication thereof. (Citations)

"Plaintiff charges that these posters were circulated and published while an official investigation of the incident was being conducted by the Police Review Board and the Grand Jury. The posters themselves, their design and construction, the placing of the words complained of above the picture of the plaintiff in uniform—these are all subjects for factual interpretations on the issues of actual malice and fair comment." (Citations)

The Supreme Court of Illinois in the case of *Coursey* v. *Greater Niles Township Public Corporation,* 40 Ill. 2d 257, reviewed an article wherein the plaintiff, a police officer, was accused of following a young girl and making immoral suggestions to her. The Court said, at page 266:

"The amended complaint did considerably more than repeat the epithet of 'actual malice'. As previously noted, it charged that 'the defendants and each of them, intending to injure the plaintiff's good name and injure him in his livelihood, with knowledge that it was false, and with reckless disregard to whether it was false or not maliciously composed, published and caused to be published in their said newspaper, an article containing false, scandalous and malicious libel concerning the plaintiff.' *It also incorporated by reference the article in question, which on its face gives rise to factual inferences tending to support the charge of actual malice.*" (Emphasis supplied)

The impact of the article itself as evidence on the question of malice was put in its proper evidentiary position in the case of *Tucker* v. *Kilgore,* 388 S.W. 2d 112. The Supreme Court of Kentucky in discussing the *New York Times* rule said at page 114:

"The significance of the defense of qualified or conditional privilege is that it removes the conclusive presumption of malice otherwise attaching to words that are actionable *per se* and thereby casts on the plaintiff a technical burden of proof in that respect. (Citations) *This does not require any greater degree of proof by the plaintiff because the offensive character of the words still is sufficient by itself to support an inference of malice.* The practical difference, therefore, is that in one case the instructions do not require a finding of malice as a condition of recovery and in the other they do." (Emphasis supplied)

What is the nature of the article in the instant case? It was not a paid advertisement sponsored by persons well-known in public affairs. It was not a general attack on Government. It named the plaintiff, specifically charging him with heinous crimes in the course of his duties. The article said:

"The new paperback has 307 pages and the simple title *Justice*. It is the last of five volumes in the second report of the Commission on Civil Rights, first created by Congress in 1957. *Justice* carries a chilling text of police brutality in both the South and the North and it stands as a grave indictment, since its facts were carefully investigated by field agents and it was signed by all six of the noted educators who comprise the Commission. . .

". . . the police, says *Justice,* 'broke through two doors, woke the Monroe couple with flashlights, and forced them at gun point to leave their bed and stand naked in the living room. The officers roused the six Monroe children and herded them into the living room. Detective Frank Pape struck Mr. Monroe several times with his flashlight, calling him 'nigger' and 'black boy.' . . ."

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This article was disseminated to Time's 2,700,000 subscribers. The article was no different than the "wanted for murder" poster in the *Gilligan* case (*supra*) or the finding of immoral conduct in the *Coursey* case (*supra*). Time's reporting of a finding of a criminal act, if false, on its face produces an inference of malice.

B. The admission of Times' author that he knowingly translated the Commission's Report of allegations into findings of fact constitutes knowledge that his story was false and is evidence of malice.

The record in this case clearly indicates that the author of the defendant's article knew that what he was writing was false. In spite of this, Time contends that, by its mere protestations of good faith, it is entitled to the protection of the First Amendment. Such is not the law. In the case of *Garrison* v. *Louisiana*, 379 U.S. 64, at page 75, this Court held:

> "The use of calculated falsehood, however, would put a different cast on the constitutional question . . . For the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social or political change is to be effected. Calculated falsehood falls into that class of utterances which 'are no essential part of any exposition of ideas and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality . . .' (citations). Hence the knowingly false statement and the false statement made with reckless disregard of the truth do not enjoy constitutional protection."

The case of *Skain* v. *Weldon*, 422 S.W.2d 271, involved the reversal by the Supreme Court of Missouri of a jury

verdict for the defendant because of faulty instructions. The Court also reviewed the record and determined that there was a sufficient showing of malice. This was an action by City Councilmen against newspaper and television companies. The defendant companies were opposed to the granting by said City Council of a television franchise to another competing company. The defendant company ran an editorial defamatory as to all Councilmen not particularly named. Plaintiff was not particularly named and the remarks were false as to him. In the *Skain* case, after reviewing *New York Times* v. *Sullivan* (*supra*), the Court stated, at page 275:

> ". . . it does not appear, however, that the Supreme Court's concept of malice differs from what 'malice' has always meant in this jurisdiction; 'what the plaintiff had to show to prove expressed malice was that the publication, insofar as it was privileged, was not made in good faith to give a fair and impartial account of the charges, trial and result, which were matters of public concern and about which it was privileged to inform the public, but it was done with a wrong motive. That is what malice is, the presence of an improper motive . . .' Proof of falsity of facts and knowledge of such falsity is proof of actual malice. (*Cook* v. *Pulitzer*, 241 Mo. 326, 145 S.W. 480), because that does unquestionably show a wrong motive. Therefore, if the defendant has added material facts on its own authority which it knew to be false, it would thereby go outside of its privilege and malice would be inferred. It is likewise a wrong motive which would tend to show malice to state something is the truth without knowing whether it is true, recklessly and without any reasonable attempt to find out about it or with complete disregard of other known facts.'"

The case of *Fox* v. *Kahn,* 221 A. 2d 181, concerned a speech made by the defendant at a public gathering where he stated that there was a murder in town and the District Attorney picked up a young weak-minded fellow and got a confession out of him; that the District Attorney put this fellow in a room by himself and beat a confession out of him with a telephone book. The charges were repeated in a letter to a local newspaper. On the trial the defendant denied uttering the words but admitted he knew that, at the time the words were allegedly spoken, the plaintiff did not administer the alleged beating, nor order it to be done. The Court upheld a jury verdict for the plaintiff. At page 183 the Court said:

> "Whereas here, knowledge of falsity is not only proved but admitted, actual malice is proved and it is unnecessary to prove that defendant uttered the words with reckless disregard of whether the statement was or was not false."

In *Spahn* v. *Julian Messner, Inc.,* 233 N.E. 2d, 840, the Supreme Court of New York upheld a libel judgment in favor of the baseball player, Warren Spahn, applying the *New York Times* test. At page 842 the Court states:

> "An examination of the undisputed findings of fact below as well as the defendant's own admission that 'in writing this biography the author used the literary techniques of invented dialogue, imaginary incidents and attributed thoughts and feelings' . . . clearly indicates that the test of *New York Times* v. *Sullivan* (supra) and *Time, Inc.* v. *Hill* (supra) has been met here.
>
> "The trial judge found gross error of fact and 'all pervasive distortions, inaccuracies, invented di-

> alogue and the narration of happenings out of context' (citations). These findings were unanimously affirmed by the appellate division. The Court wrote 'it is conceded that use was made of imaginary incidents, manufactured dialogue and a manipulated chronology. In short, defendant made no effort and had no intention to follow the facts concerning plaintiff's life except in broad outline and to the extent that the facts readily supplied a dramatic portrayal, attractive to the juvenile reader. This liberty . . . was exercised with respect to the plaintiff's childhood, his relationship with his father, the courtship of his wife, important events during their marriage and his military experience.' (Citations)
>
> "Exactly how it may be argued that the 'all pervasive' use of imaginary incidents—incidents which the author knew did not take place—invented dialogue—dialogue which the author knew had never occurred—and attributed thoughts and feelings which were likewise a fragment of the author's imagination—can be said not to constitute knowing falsity, is not made clear by the defendant. Indeed, the arguments made here are in essence not a denial of knowing falsity but a justification for it."

In Carpenter's Work entitled *Defamation under the First Amendment—The Actual Malice Test and the Public Official,* 46 N. C. L. Review, 392 (1968), the author reviews what constitutes malice. At pages 396 it is stated:

> "The fact that the story was based on a written report from which information was inaccurately reported, strongly suggests the existence of actual knowledge."

The case of *Varnish* v. *Best Medium Publishing Co.*, 405 F. 2d 608 (1968), involved the reporting of a suicide and murder by plaintiff's wife. Plaintiff attacked the

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article because it employed "a happy wife and mother" theme, which was false. There was a suicide note available to the author when the story was written, which said:

> "Just a note and explanation to let you know that I am going to put the three children and myself to sleep forever. I see no future for the children or myself. Mitch (plaintiff) is impossible and this is the only way to get away from him. I've had a miserable life since the time I met him. Tell Uncle Chris and Uncle Butch I'm sorry about the money they each loaned me in 1961 . . . I owe so much I'll never have to bother anyone anymore."

In his article the author said:

> ". . . police found a note left by Mrs. Varnish for her mother. It said: 'Just a note in explanation to let you know I am going to put the three children and myself to sleep forever. I can't go on.'"
>
> "It was an explanation that explained nothing, least of all to the shocked Varnish."

The Court on review required malice and upheld the jury verdict. At page 612 the Court said:

> "Evidence of recklessness consists largely of the author's testimony on cross-examination that he had no basis except his own 'presumption' for labeling Mrs. Varnish a happy wife and mother. Both the suicide note and the police report which the author had in his possession indicated that the Varnishes did not have a happy home life. Likewise, the manner in which the suicide note was used by the author could be taken as evidence of intent or recklessness. Therefore, the jury was entitled to find that the article was published with knowledge that it was false or in reckless disregard for the truth."

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Recently the Circuit Court of Appeals for the Second Circuit rendered its decision in the case of *Goldwater v. Ginsburg*, 414 F.2d 324 (1969). This case was concerned with an article in "Fact" Magazine, which article maintained that Senator Barry Goldwater was psychologically unfit to be President. There, as in the instant case, the defendant sought to escape malice by contending that he relied on other sources in setting forth his story. The Court upheld a denial of motion for summary judgment and of a motion for directed verdict and jury verdict. At page 337 the Court said:

> "Citation of sources for most of the statements about Senator Goldwater in Part I of the 'Goldwater issue' and the accurate reprinting in Part II of most of the original responses of psychiatrists to the Fact questionnaire, does not, as appellants appear to claim, insulate appellants from responsibility for any of the false statements they made. Reliance upon newspaper articles, books and campaign literature and upon accurate reprinting of another's letter are only factors which, with other factors, are probative of whether the publisher of the cumulated material was motivated by actual malice when he caused the full material to be published. Repetition of another's words does not release one of the responsibility if the repeater knows that the words are false or inherently improbable, or there are obvious reasons to doubt the veracity of the person quoted or the accuracy of the report. (Citations) Furthermore, in our case, Ginsburg added certain innuendoes to some quoted statements and quoted other statements out of context in order to support his predetermined result. One cannot fairly argue his good faith or avoid liability by claiming that he is relying on the report of another if the latter's statements or observations are altered or taken out of context. Also,

if Ginsburg's 'melding' and 'distillation' of letters results in misplaced emphasis or exaggeration, or distortion, he cannot reasonably maintain that the misstatements contained in the new product he thereby created are not his misstatements.

"Viewing the submitted material and the inferences which might be drawn from them 'in the light most favorable to the party opposing the motion' (Citations), the district court properly concluded that a trier of fact should have the opportunity to decide whether appellants were liable to appellee."

In the instant case, as in the *Varnish* case and the *Goldwater* case, we are dealing with a magazine report of another writing. Therefore, the manner in which this writing was used by Time's author could be taken as evidence of intent or recklessness. Furthermore, in the instant case Time's author omitted portions of the writing, quoting portions of statements out of context in order to support his predetermined result. He cannot fairly argue his good faith or avoid liability by claiming that he is relying on the report of this high government Commission if the latter's statements or observations are altered or taken out of context. Also, if this author's omissions and distillation resulted in misplaced emphasis or distortion, he cannot reasonably maintain that the misstatements contained in the new product he thereby created are not his misstatements. The writing, being reported, said that a "complaint" had been filed "alleging" certain crimes. The author read this and understood this, but he chose to omit and distill the Commission's words in order to say that the Commission found plaintiff guilty of the crimes. This action is more than misplaced emphasis or distortion. It is the propagation of a known falsity. Time cannot maintain that the misstatements in its new product are not its misstatements.

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The author in this record admits that he knew and understood that the Commission was reporting mere allegations (A. 207-208). He further admitted that he omitted all reference to a complaint and allegations from the words of the Commission Report when he wrote his story (A. 176-177). Knowing and understanding what the Commission said and choosing to omit a portion of such words, changing the meaning of what was said from allegations to a finding of fact, constitutes a known falsity.

The author admits that he was trying to say by the article something more than a report of allegations in a complaint (A. 209). The author was trying to say "that the report said Pape and his fellow officers did what the Commission Report merely said the Monroe complaint alleged they did." (*Pape* v. *Time, Inc.*, 354 F. 2d 558, at page 560). This was his predetermined purpose and he altered what the Commission said accordingly.

The Circuit Court of Appeals below, in its third decision, recognized such action on the part of Time's author as malice. (*Pape* v. *Time, Inc.*, 419 F.2d, 980). There the Court said:

> "In our second opinion we stated at 354 F. 2d 560, 'Time's writer who prepared the article must have known the statements as to Pape's conduct were only allegations in a complaint in a civil suit.' Since that time the author of the Time article, one Edward F. Magnuson, has so testified. He admits that when he wrote the article he knew the Commission's Report stated that the alleged assaults on Monroe and his family were based upon complaint which made such allegations. Magnuson was a former police reporter for the Minneapolis Tribune and he testified he knew the meaning of the word 'complaint' and of the word 'alleged.' However, Magnuson deliberately and know-

ingly failed to mention in his article that his story of the alleged conduct and action of Pape and the other police officers was based on an allegation in a complaint in a pending suit.

"We are here concerned with Time's falsification of what the Report said rather than the falsification of a story about the Monroe incident. Surely a deliberate act of omission can show malice, as well as an act of commission. Time omitted mention of the fact that when the article was written, the Pape-Monroe incident was reported in 'Justice' as allegations in a complaint, not as a proven fact, and the alleged injury to Pape was in Time's stating that the Commission reported that incident as true, instead of stating that the Commission reported it as alleged to be true. The jury could conclude that this amounted to an 'intent to inflict harm through falsehood.' *Garrison* v. *Louisiana,* 389 U.S. 64, 74 (1964); *Henry* v. *Collins,* 380 U.S. 356, 567 (1965)."

In his concurring opinion in the Court below, Judge Kiley specifically held that the action of the author heretofore analyzed constituted known falsity. It is there said:

"It is my view that the testimony of Magnuson referred to in Judge Duffy's opinion was sufficient prima facie that Time published the article in suit 'with knowledge that it was false.' Publication of the article with the words of the Commission's Report deliberately omitted could reasonably be found to be a publication of 'a defamatory falsehood . . . with knowledge that it was false.' This met the test of *New York Times* v. *Sullivan* (citation) under which either knowledge of falsity or reckless disregard of whether the material is false or not is required for proof of the vital elements of 'actual malice.'"

In his testimony and in the brief to this Court the author and Time Magazine attempt to justify their false

reporting by references to headnotes in the Commission Report and the statement in the Report as follows (A. 328):

> "In the text of this chapter the Commission briefly describes the alleged facts in eleven typical cases of police brutality. They are presented in the belief they contribute to an understanding of the problem. The allegations of misconduct are supported in several cases by criminal convictions or findings by impartial agencies; in others, by sworn testimony, affidavits from eye witnesses, or by staff field investigations. In no case has the Commission determined conclusively whether the complainants or the officers were correct in their statements. This is the function of a court. The Commission is of the opinion, however, that the allegations appeared substantial enough to justify discussion in this study."

However, like the *Spahn* case (supra), "the arguments made here are in essence not a denial of knowing falsity but a justification for it."

Nor does reference to headnotes in the Commission's Report or the above-quoted language or other portions of the Report bear out Time's attempted justification. The Commission's Report is cautious and circumspect throughout. Even in the above-quoted language relied on by Time, the Commission refers to 'alleged facts.' It cautions that in no case has the Commission determined conclusively the truth of the allegations, for that is the function of the court. It says that some cases are supported by criminal conviction and others by investigation, but it nowhere says that all are so supported. It actually says the opposite. In its introduction the Commission talks merely of allegations. It employs the use of initials instead of names. It recommends legislation

which would aid and encourage persons filing civil rights complaints. The only logical reason for the Commission to include in its report the Monroe-Pape complaint was as an example to support this recommendation for legislation. It was not in *"Justice"* to report that Pape and his fellow officers did the heinous acts as Time falsely stated.

A case particularly similar to the instant case is the recent District Court decision in *Ragano* v. *Time, Inc.*, 302 F. Supp. 1005 (1965). In that case Time referred to an attorney as a member of the Cosa Nostra, knowing such individual was an attorney. There, like here, Time attempted to justify its falsehood on the ground that its author, although knowing what he was doing, honestly believed in the truth of that which he said. At page 1010 the District Court held:

> "As of this writing Time has moved successfully for summary judgment in five other libel cases brought throughout the country. This fact is quite significant in illustrating the plaintiff's burden in such cases. Perhaps in no other area of civil litigation is the burden so ominous as in the law of defamation. To survive summary judgment proceedings it is necessary that he offer some evidence upon which a jury could find convincing clarity of actual malice or reckless disregard. The decisions require that he come forward with evidence of the defendant's state of mind; in effect, he must prove a negative. There must be '* * * sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts.' The standards enunciated, however, were all set forth in cases where the defendant had no actual knowledge of falsity. Under those circumstances the publisher's position was supportable. The present case differs, however, because

> Time had actual knowledge of the fact that the plaintiff was an attorney, yet decided to disregard or omit this fact. The First Amendment does not require that the plaintiff show knowledge of falsity and then, as Time contends, bad faith in the publisher's choice of disregarding the truth. Where the plaintiffs presents evidence to show that the publisher chose to substitute his opinion for facts actually known by him in an article that is capable of a defamatory meaning he has come forward with sufficient evidence to show reckless disregard."

This Court, in the case of *St. Amant* v. *Thompson*, 390 U.S. 727 (1968), at page 732, held that mere protestations of good faith are insufficient to obviate malice. The Court there said:

> "The defendant in a defamation action brought by a public official cannot, however, automatically insure a favorable verdict by testifying that he published with the belief that the statements were true. The finder of fact must determine whether publication was indeed made in good faith. Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination or based wholly on a nonverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improper that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his report."

The author of Time's article was reporting another writing. He read the other writing, knew what it said, but knowingly and deliberately chose to omit certain words, translating mere allegations in such writing to

findings of fact. Such constitutes sufficient evidence on the question of malice to permit the cause to go to the jury.

C. Time's total want of verification and investigation when information was easily available, and the unreasonableness of the libelous statements with their dire consequences, constitute evidence of reckless disregard of whether its story was false or not.

Curtis Publishing Company v. *Butts,* 388 U.S. 144, involved an article appearing in the Saturday Evening Post concerning the coach of the University of Georgia football team. This article accused Butts of fixing the football game between the University of Georgia and the University of Alabama. At the time of the article Butts, although coach for a State university, was employed by an independent private corporation. In the *Butts* case this Court extended the *New York Times* rule to "public figures" but upheld the jury verdict on the ground that malice had been shown. This Court equated malice to "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers."

So also this Court, in *St. Amant* v. *Thompson,* 390 U.S. 717 (1968), inquired into the manner of investigation to determine whether or not the story was published with reckless disregard.

In the case of *Spahn* v. *Julian Messner, Inc.,* 21 N.Y. 2d 124, 223 N.E.2d 840 (1967), the Court, at page 843, held that the mere reading of newspaper clippings was an insufficient investigation, and that reckless disregard existed.

The courts of Minnesota have been forerunners in the application of the malice test to actions for libel. In its

recent decision in *Mahnke* v. *Northwestern Publications, Inc.*, 280 Minn. 328, 160 N.W.2d (1968), the Supreme Court of Minnesota upheld a jury verdict in a libel action in favor of a plaintiff police captain. The article in question was entitled "Cop Rebuke in Tot Molesting Urged." The article reported an interview with a Catholic priest who had sent a mother to the police after she had reported to him that her husband was sexually molesting their six-year-old daughter. Though the priest was not at the police station at the time of the incident, the article reported him as stating that the plaintiff police captain had refused to arrest the father, that when the matter was called to the police captain's attention he flew into a rage and accused the mother of trying to get even with her husband. The article also reported that the priest said the police captain told the mother there is no case and refused to send out detectives. All of these things were false. At page 337 the Supreme Court of Minnesota said:

> "Under the Supreme Court rule enunciated in the *New York Times* case a person is culpable of actual malice if he makes a false statement against a public official with 'reckless disregard' of whether it is false or not. It may be said that precisely what constitutes reckless disregard is an open question, since it must depend upon the facts and circumstances of each particular case. Undoubtedly further litigation concerning the application of this standard may well be expected in the future."

At page 341 the Court further stated:

> "The article was placed on the front page of a newspaper with a title sufficiently catchy so that it might cause persons merely glancing at the article to believe that the plaintiff might have been involved in the molesting of a child. The location of the article demonstrates that it was given top importance and

Schwartz (reporter) admitted that he knew the subject was serious. Defendant's executive director admitted that readers of the story would be indignant and think that something should be done about it. Thus, it appeared to us that the gravity of the charges in this story was a factor to be considered by a jury in assessing the conduct of the defendant."

In passing on the evidence sufficient to show reckless disregard the court particularly considered the fact that the reporter did not talk to the plaintiff or anyone who was present when the occurrence took place, but rather based its story on hearsay (page 343). At page 343 the Supreme Court of Minnesota held:

"Under the standards applied by the United States Supreme Court in the *New York Times* case for the protection of freedom of the press under the First Amendment, neither proof that a statement is false nor that it is negligently written is sufficient to establish actionable libel against the defendant. In order for the plaintiff to recover it is essential that he show 'actual malice' on the part of the defendant in the publication of the article by reckless disregard of whether the statements therein were false or not. We think the jury on the record presented here could find defendant's publication to have been made with such disregard. Several factors permitted this conclusion. Under all of the circumstances the story was needlessly false. The statements relating to the plaintiff could have been checked out by a reporter in a matter of hours and the false statements eliminated in a follow-up story in the next edition. The only purpose in publishing Father McGuire's version of the story six days old without verification of the plaintiff or others present at the meeting — and in placing it on the front page — was to attract the interest of the reading public. The story was given the most controversial view possible in the face of

the warning that had been given by Chief Einslow that in fact the matter was based entirely upon a misunderstanding. The jury certainly could find that if the defendant were concerned about the truth of this article, it would under the circumstances have required additional supervision and checking before releasing the article for publication. Instead, routine treatment was given the story being developed by a few telephone calls despite its unusual nature and no reporters were assigned to check out the facts. Defendant's executive editor acknowledged that it would have been preferable to have the reporter talk to a person who was at the meeting. Schwartz admitted, however, that he would have published the story in the early edition without any verification but for the action of the city editor in holding it up. Under the circumstances the evidence of the falsity contained in the article is also evidence of recklessness."

Finally, after reviewing the instruction given to the jury, the Minnesota Supreme Court, at page 351, stated:

"The Court and the memorandum accompanying the order denying the defendant's post trial motion point out that the *New York Times* case laid down no guidelines as to what constitutes a reckless disregard except that mere negligence is insufficient and said that what amounts to reckless disregard is clearly a jury question (citations). We agree that this was a jury question. Moreover, we find the instructions given to the jury placed squarely before it the law set forth in the *New York Times* and *Butts* cases. It is the established rule in this state that a motion for judgment notwithstanding the verdict accepts the view of the evidence most favorable to the verdict and admits every reasonable inference to be drawn from such evidence as well as the credibility of the testimony of the adverse party. And if the application of this rule in the light of the evidence as a whole discloses a reasonable basis for the verdict, the motions must

be denied (citations). Here, since there was evidence which did support a finding that the defendant was guilty of reckless disregard of whether the article was false or not, and the verdict was arrived at under instructions clearly stating the applicable law, the trial court could not have properly granted defendant's motion."

In the light of the aforesaid cases the instant record discloses sufficient evidence of "reckless disregard" as to require the case to be submitted to the jury.

The Time article in the instant case begins with a catchy title: "Dawdling on the Corner." A like catchy title "Cop Rebuke in Tot Molesting Urged" was found evidence of reckless disregard in *Mahnke* v. *Northwestern Publications, Inc. (supra)*.

The introductory remarks of the instant Times story conditioned the reader to serious charges. In its introduction the article states:

"The new paperback book has 307 pages and the simple title *Justice*. It is the last of five volumes in the second report of the United States Commission on Civil Rights first created by Congress in 1967. *Justice* carries a chilling text about police brutality in both the South and the North — and it stands as a grave indictment since its facts were carefully investigated by field agents and it was signed by all six of the noted educators who comprised the Commission."

The defendant here, therefore, cannot deny that it was aware of the gravity of what was to follow and the probable consequences to anyone falsely accused therein.

Our Time story then goes on to falsely state that the Commission found plaintiff guilty of assault and battery, vituperation and police brutality. The story concludes

"the officers were not punished . . .", a phrase calculated to produce indignation on the part of the reader. Thus, here, as in the *Mahnke* case, "the gravity of the charges in this story was a factor to be considered by a jury in assessing the conduct of the defendant."

Time has a circulation of over two and one-half million readers weekly, which readers are located throughout the country and the world. Whether or not malice exists depends to a great extent on the persons to whom the libelous statement is made. To disseminate falsehoods to such a far-flung audience is evidence of reckless disregard.

Full knowledge of the harm which a falsehood may likely produce to the defendant is evidence of reckless disregard and was so considered by Chief Justice Warren in his concurring opinion in *Curtis* v. *Butts,* 388 U.S. 144, at pages 169 and 170. One's duty to investigate a statement which would have a foreseeably disastrous effect on persons libeled is much greater than the duty to investigate a statement which would have relatively minor foreseeable consequences. In the instant case the plaintiff was a police officer whose responsibility it was to enforce the law. The article accused him of police brutality and racism in the course of his employment. The article came during an era when race relations are an important segment of police activity. Under such circumstances falsehoods disseminated by the defendant could have no other result than to destroy plaintiff's effectiveness in this important segment of police work. The dire consequences to the plaintiff of this falsehood are obvious.

As a matter of fact the record discloses that the plaintiff, who had spent almost his entire career in investigating activities prior to the Time article (A-30), was relegated to the traffic division in which he had no experience after

the libelous article. (A-94). Defendant, Time Magazine, when it published its article, recognized the seriousness of its charges and knew of the disastrous effect it would have on the plaintiff.

The instant Time story was in no sense hot news. The author was not confronted with an immediate deadline.

On the question of investigation of the truth or falsity of the matters set forth in the instant Time story, there was presented the testimony of the author, Magnuson, and the researcher, Booth. All the author looked to for his investigation were the Commission Report, a press release which did not mention plaintiff, and a New York Times story which did not mention plaintiff. This constituted no investigation at all. The author cannot rely on the investigation of the Commission for what he said, since that investigation only revealed that a complaint had been filed.

The story was submitted to the researcher, Booth, who besides reading it examined Time's "morgue" files. The researcher in no way called the various stories constituting Time's "morgue" to the attention of the author (A. 205). Therefore, the contents of such "morgue" stories in no way influenced the content of the article. In any case, similar research constituting nothing more than newspaper and magazine clippings, the authenticity of which have not been checked, was held insufficient in *Spahn* v. *Julian Messner, Inc. (supra)*. Even these clippings and suggested stories in the "morgue" files, insofar as they related to the Monroe-Pape incident, were only reporting allegations in a complaint or conversations with Monroe. None of them said, as Time said, that Pape did commit an assault on Monroe.

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Defendant, Time Magazine, is a large organization with bureaus and personnel in Washington, New York and Chicago. They have the facilities to verify anything they care to publish. In spite of such facilities easily available, the author of the instant Time story made no attempt to interview plaintiff, Pape, nor anyone having any knowledge of the incident it was reporting. The author of Time's story did not even have the benefit of any affidavit as existed in the *Butts* and *St. Amant* cases. No independent investigation of any kind was conducted by Time Magazine in the instant case. Such failure is evidence from which a jury could conclude that Time in publishing its falsehood was guilty of reckless disregard — malice.

III.

On a Motion For Directed Verdict the Court Must Decide Whether There Is Any Evidence from Which a Jury Could Find for the Plaintiff and in so doing, the Evidence Must be Taken in the Light most Favorable to the Plaintiff According to Him All Reasonable Intendments and Inferences Favorable to Him.

As has been said, this is an appeal from an order of the District Court directing a verdict against the Plaintiff in favor of the Defendant after the close of all the evidence.

The Federal Constitution guarantees all parties the right to a trial by jury, which right is one of the most sacred in our system. The jury is the recognized trier of fact. Questions of law are reserved to the court (*Magenow v. Aetna Freight Lines*, 79 S. Ct. 1184, 360 U.S. 273). Cases should not lightly be taken from the jury for to do so is to abridge this sacred right. It is only where the evidence is all one-sided or so overwhelmingly on one side as to leave no doubt of what the fact is, that the case or an

ssue becomes one of law for the court and the court is ustified in taking the case from a jury. An issue of fact s for the court only when the minds of reasonable men ould not differ.

In the trial of a case before a jury in the Federal Court, it is the general rule that the functions of the judge and jury are governed and controlled by Federal rules and decisions and not by State rules and decisions. (35B Corpus Juris Secundum, Section 958, P. 324). The Federal rule on motions for directed verdict is stated by the United States Supreme Court in the case of *Gunning* v. *Cooley*, 281 U. S. 90, 50 S. Ct. 231, 74 L. Ed. 720. In this malpractice action the Supreme Court upheld the denial of a motion for directed verdict. At page 94, the Court said:

"A mere scintilla of evidence is not enough to require the submission of an issue to the jury. The decisions establish a more reasonable rule 'that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed.' (Citations)

"Issues that depend on credibility of witnesses, and the effect or weight of the evidence are to be decided by the jury. And in determining a motion of either party for a peremptory instruction, the court assumes that the evidence for the opposing party proves all that it reasonably may be found sufficient to establish, and that from such fact there should be drawn in favor of the latter all the inferences that fairly are deducible from them (Citations). Where uncertainty as to the existence of negligence arises from a conflict in the testimony or because, the facts being undisputed, fair minded men will honestly draw different conclusions from them, the question is not one of law but of fact to be settled by the jury. (Citations)."

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The test is not whether the evidence brings conviction to the mind of the trial judge *(Deere* v. *Southern Pacific Co.*, 123 F. 2d 438). Nor is it the same test which prevails on a motion for a new trial. As was stated in *Macarages* v. *Raymond Concrete Pile Company*, 220 F. 2d 889, at page 891:

> ". . . A Motion for directed verdict must be based on the complete absence of any evidence to warrant submission to the jury; whereas a motion for new trial concededly may be granted because the trial court concludes that the verdict is merely against 'the greater weight of the evidence.' "

The reason for a different test on a directed verdict than on a motion for new trial is succinctly stated in 35B C.J.S. Section 979, Pg. 353, where it is stated:

> "Generally speaking it is desirable not to direct a verdict at the close of the evidence but to reserve decision on any motion therefor and allow the jury to bring in a verdict; and the trial judge may then, under the rule, set aside the verdict as against the weight of the evidence and grant the motion. The reason this procedure is desirable is that the reviewing court on appeal may, if it disagrees with the trial judge, reinstate the verdict and unnecessary retrials may be avoided when the trial court erroneously rules on a motion for a directed verdict."

Evidence may be considered regardless of who produced it at the trial. It is to be considered in the light most favorable to the non-moving party *(Higaski* v. *Shefflett*, 195 F. 2d 784). In passing on whether there is sufficient evidence to submit an issue to the jury, the Reviewing Court should look only to the evidence and reasonable inferences which tend to support the case of a litigant against whom a peremptory instruction has been given

(*Wilkerson* v. *McCarthy*, 336 U. S. 53, 57, 93 L. Ed. 497, 502).

An issue in the instant case is malice or state of mind. It has been uniformly held that questions of good faith, motive, intent and the like, if at all doubtful, are ordinarily questions to be determined by the trier of facts (*Woodward* v. *U. S.*, 208 F. 2d 893 at Pg. 899; *National Labor Relations Board* v. *Brown & Root, Inc.*, 203 F. 2d 139 at Pg. 147). This rule is particularly applicable where, as here, proof is largely in the hands of the Defendant. The instant case also involves a meaning of a writing and it has been uniformly held that doubt of what a writing means is for the jury (*William* v. *Alver*, 252 F. 2d 895; *The U. S. For the use of Dixie Plumbing & Supply Co.* v. *Taylor*, 293 F. 2d 717; *Washington Post Co.* v. *Chaloner*, 250 U. S. 290, 395 S. Ct. 448, 63 L. Ed. 987).

A reading of the opinion of the District Court clearly indicates that such court reached its conclusion to direct a verdict, disregarding the rules of law applicable on a directed verdict. In such opinion the court itself admits that it had lingering doubts as to the propriety of directing the verdict at the close of the Plaintiff's case, but states that such doubts disappeared at the conclusion of the entire case. If the evidence most favorable to the Plaintiff created any doubt in the mind of the court under the rules governing a directed verdict, the court should have allowed the case to go to the jury.

In its opinion in support of its order directing a verdict, the District Court only looked at the evidence most favorable to the Defendant. The District Court even had difficulty admitting the falsity of the Time story when a mere reading of the Time story and the Commission Re-

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port, which it was quoting, shows that the Time story was false. As a matter of fact the evidence most favorable to the Plaintiff (as well as all the competent evidence) shows that the Time story not only falsely reported what the Commission said but also falsely reported what actually happened. Eight eye witnesses testified to the actual events forming a basis for the magazine article and the Commission Report. There can be no question that a fair-minded jury under the rules applicable to a directed verdict could find the Time story false.

In its opinion the District Court considers only so much of the testimony of the witnesses of Time magazine as it feels is most favorable to such Defendant. It ignores the testimony of the author from which a fair-minded jury might infer knowing falsity. The author states that he omitted the part of the Commission Report which read "on the basis of the Complaint which alleged that." The author admitted that he read such words in the report and as a former police reporter he understood the meaning of the words "complaint" and "allegation". He stated that by his article he was not trying to tell the readers that all he was reporting were allegations of a complaint. He states that he was trying to say in such article that these were more than allegations. From such testimony a fair-minded jury could infer that the author knowingly published a falsehood and such is malice under the definitions laid down by the Supreme Court of the United States.

The District Court gave no consideration to the Time story itself. This story directly stated that an important commission of the United States government found Plaintiff guilty of a crime, assault and battery, and of calling a person "nigger" and "black boy" in the course of his professional activities. Plaintiff was mentioned by name

whereas others in the article were mentioned only by initials. Such an article on its face gives rise to a factual inference tending to support the charge of actual malice (*Coursey* v. *Greater Niles Twp. Pub. Corp.*, 40 Ill. 2d 257 at page 266; *Tucker* v. *Kilgore*, 1964 Ky. 288 S.W. 2d 112). Under such circumstance the case should have been left to the jury.

The District Court justified its abandonment of the rule governing motions for directed verdict on the grounds that to allow the case to go to the jury would have a "chilling effect" on the exercise of press freedom. The Supreme Court in *Time* v. *Sullivan*, 376 U. S. 254, might have established the rule, requiring malice in libel actions against public officials, to alleviate the "chilling effect" of libel actions on press freedom but it did change the rule that a verdict shall not be directed where there is any evidence to support it. For the District Court to so act is not only sacrificing the right of privacy but also the right to trial by jury on the altar of press freedom.

CONCLUSION

The trial court should not have directed a verdict if there was any evidence from which a fair-minded jury could conclude that the Defendant, Time Magazine, in publishing the falsehood acted with actual malice — that is, with knowledge of the falsity of its story or with reckless disregard of whether its story was true or false. In determining whether there was any such evidence all matters should have been looked at in the light most favorable to the Plaintiff. The Time article produced an inference from which a fair-minded jury could find actual malice.

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In addition, the admission of the author that he read the Commission Report, understood its contents, and knowingly left a portion of the Report out, thereby translating mere allegations in the Commission's Report into findings of fact, constituted evidence from which a fair-minded jury could conclude that Time knowingly disseminated a falsehood and was guilty of malice. So also the total lack of investigation on the part of Time, Inc. before publishing its falsehood is evidence from which a fair-minded jury could reasonably conclude that the Defendant was motivated by actual malice. It was, therefore, error for the District Court to direct a verdict and the Circuit Court of Appeals for the Seventh Circuit properly reversed and remanded.

For the reasons heretofore set forth, Plaintiff prays the decision of the Seventh Circuit be affirmed.

Respectfully submitted,

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DATED: July 29, 1970